CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MAY TERM, 1819.

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WILLIAMS vs. *GILBERT.*

WILLIAMS vs. GILBERT.

An obligation for a given quantity of cotton is not to be discharged by the nominal sum in money, which the parties intended to discharge by the delivery of the cotton.

APPEAL from the court of the second district.

MARTIN, J. delivered the opinion of the court. The defendant is sued, as curator of the estate of the late W. Gilbert, on an obligation of the deceased, in the following words; "I have this day sold to B. Williams, jun. ninety thousand weight of cotton, of a good quality for the Orleans market; which cotton I am to deliver him or his agent, on board of some vessel in New-Orleans or in that port, on or before the 28th of March next, as he may direct and have received his obligation, in payment of the same. The cotton to be well baled and marked B. W. La-

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fourche, March 28th, 1815, W. Gilbert." On the back, are credits for several quantities of cotton delivered.

The defendant pleaded the general issue.

At the trial the parties agreed on the following facts. 1. The cotton, contracted to be delivered by the deceased, was to be received and taken by the plaintiff, in lieu of $3,000, due him at the date of the contract. 2. On that day cotton was worth from 14 to 15, and at the same time stipulated for its delivery, 30 cents. 3. The deceased's signature and the credits are admitted. 4. The plaintiff did not attempt to take advantage of the defendant in the contract for the delivery of the cotton.

The district court gave judgment for the plaintiff, for the value of the cotton at 30 cents, the admitted value of the cotton on the day on which it was to have been delivered. The defendant appealed.

His counsel contends that the judgment ought to have been for the nominal sum due, on the day of the contract, only: deducting the value of cotton delivered. He relies on 2 *Pothier on obligations, n.* 497.

We are of opinion, that the present case differs materially from those cited by Pothier, viz: that in which a husband hypothecated some es-

tate for the security of the wife's dowry, and it was agreed that it should be taken in payment of the dowry, at the dissolution of the marriage—the other, the case of a lease, in which a rent of five hundred livres was reserved, to be paid in wine, made on the premises. In both these cases, the mention of payment, in real estate or wine, was held to have been made for the sole purpose of securing to the debtor the faculty of paying in these objects, in lieu of money: and inserted for his sole benefit, so as to leave him at liberty to pay either money or the object mentioned, as he saw fit.

In the case of the rent, the price of the wine not being fixed, it is true, that if the lessor had brought suit, he could have recovered five hundred livres only. Hence, it follows that the lessee might liberate himself by paying beforehand the sum which, if a suit was brought, the judge would condemn him to pay, viz: that of five hundred livres.

The case of the husband differs from the above, and seems to afford a rule favourable to the defendant. For there the husband, notwithstanding an agreement, that the hypothecated estate should be given in payment of the dowry, may keep it, if it suit his interest, and pay in money the nominal sum received: in other words, have the benefit of the rise, without incurring the hazard of the fall, of the value of the estate.

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Cases which deviate from the general principle *qui sentit commodum, debet sentire et onus*, must not afford a rule of decision in others, not precisely similar. It would be destructive of every thing like commerce, if an obligation to deliver a specific quantity of merchandize could not be enforced either specifically, or by the payment of a sum of money, which could enable the creditor to purchase the same quantity of merchandize, on the day on which it was to have been delivered. Here, no particular sum of money is to be repaid, by a quantity of cotton of the same value, but the defendant's intestate sold to the plaintiff a specific quantity of cotton, for which he acknowledged to have received compensation. Whether this compensation was the surrender of the evidence of a claim of the plaintiff, or an actual payment, makes no kind of difference. Justice equally demands a specific performance of the agreement on the payment of so much money, as will remunerate the creditor.

The judgment of the district court, which gives to the plaintiff, a sum equal to the value of the cotton on the day of which it was to be delivered, with interest from the inception of the suit, is correct.

It is therefore, ordered, adjudged and decreed, that it be affirmed with costs.

Morse for the plaintiff, *Duncan* for the defendant.

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CASTANEDO vs. *TOLL.*

Land cannot be affected by any parol contract, except a lease.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The petition states that the plaintiff was the owner, and in July last was in possession, of a certain plantation, and the defendant turned out and expelled therefrom his overseer, wherefore he prays to be restored to and quieted in his possession and that the defendant may be enjoined from disturbing him. A provisional writ of sequestration was obtained by which the defendant was removed from the plantation.

The answer denies all the facts in the petition, and alledges that the plaintiff and defendant entered into a partnership, in which the former put his plantation, negroes, horses, &c. and the defendant his industry, and the profits were to be divided among them, in a certain proportion.

A number of witnesses deposed that the plaintiff and defendant agreed, that the latter should act as a gardner and overseer on the plantation

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of the former, and should be rewarded by a share in the profits—that the former being dissatisfied with the conduct of the latter desired him to quit the place, and did put another overseer thereon, whom the defendant turned out.

The defendant introduced several witnesses, who proved him to be industrious and steady, testified to his conduct, and that the plaintiff wrongfully discharged him.

An instrument was prepared, in the form of partnership; but was never executed.

There was a verdict and judgment for the plaintiff and the defendant appealed.

The answer does not deny the plaintiff's title to the plantation, since it admits it to be his plantation, which he put into partnership, or the use of it. Now, the plaintiff's right thereto cannot be affected by any contract, except that of lease, which is not pretended to have existed, unless by a written act. *Civ. Code*, 310, *art.* 241.

The defendant, therefore, cannot claim any right to the plantation, under a *parol* agreement and no written one is produced. If he has been improperly turned out of his employment, in violation of the plaintiff's engagement, he has his remedy; but cannot be relieved in the present action: nor is this any reason why the plaintiff should be disturbed in the enjoyment of his es-

tate. The judgment in this case, appears to us perfectly correct.

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It is therefore, ordered, adjudged and decreed, that it be affirmed with costs.

Seghers for the plaintiff, *Livingston* for the defendant.

GIROD vs. *LEWIS.*

APPEAL from the court of the parish and city of New-Orleans.

The marriage of a slave has its civil effects, on his emancipation.

MATTHEWS, J. delivered the opinion of the court. The only question in this case, submitted to the court, is whether the marriage of slaves produces any of the civil effects resulting from such a contract, after manumission.

It is clear, that slaves have no legal capacity to assent to any contract. With the consent of their masters they may marry, and their moral power to agree to such a contract or connection as that of marriage, cannot be doubted; but, whilst in a state of slavery it cannot produce any civil effect, because slaves are deprived of all civil rights. Emancipation gives to the slave his civil rights, and a contract of marriage, legal and

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valid by the consent of the master and moral assent of the slave, from the moment of freedom, although dormant during the slavery, produces all the effects which result from such contract among free persons.

It is therefore, ordered adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Duncan for the plaintiff, *Hennen* for the defendant.

DELAZERRY vs. *BLANQUE'S SYNDICS.*

The surety on an appeal bond, when the principal has failed, is liable to pay, without an execution issued against the latter. The surety claiming a discussion, must point out property and furnish money to defray costs.

APPEAL from the court of the parish and city of New-Orleans.

DERBIGNY, J. delivered the opinion of the court. In the year 1811, the plaintiff in this case, obtained judgment in the then city court, against Wm. St. Marc. St. Marc appealed to the then superior court of the territory, and the late John Blanque became his surety. St. Marc did not pursue his appeal; but the plantiff, about three years afterwards had his judgment confirmed in the district court, to which the causes pen-

ding in the superior court had been removed. St. Marc having become insolvent, he now demands the amount of the appeal bond subscribed by Blanque.

The defendants resist this claim on two grounds: 1. that the judgment obtained upon the appeal is null, because rendered against St. Marc, after his insolvency, without making the syndics of his creditors parties to the suit; 2. that the plaintiff's demand is at least premature, inasmuch as he has not discussed the property of the debtor.

St. Marc presented twice his bilan or schedule of his affairs: the first time before, the second after, the judgment on the appeal was rendered. On his first petition for a convocation of his creditors, an order issued calling such a meeting at thirty days, and staying all proceedings against him *in the mean while*. That order was never carried into effect: the time ran out, and nothing was done. The consequence was, that after the expiration of the delay, during which the proceedings were suspended, St. Mark remained exposed to prosecution, as before the issuing of the order. The judgment on the appeal was rendered about eighteen months posterior to that order.

A few days after the date of that judgment, St.

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Marc again presented his bilan, prayed for a meeting of his creditors, and obtained the usual decree. On this occasion, the decree was acted upon, and no creditor having attended, the sheriff was, according to law, appointed syndic of the creditors.

In this state of things, the defendants maintain that the plaintiff has no right to sue them, before he has discussed the property of St. Marc.—To this it has been objected generally, that judicial sureties are not entitled to the benefit of discussion; but admitting, as the defendants contend, that the reservation, contained in their bond, makes this an exception to the general rule, that defence cannot avail them. For, in the first place, according to the words of the appeal bond, the surety is bound to pay, if the execution that may issue is not satisfied out of the appellant's property; therefore, as no execution could issue against St. Marc after his failure, the condition is resolved, and the surety must pay. 2. It is by our laws made the duty of the surety, who claims the benefit of discussion, to point out, to the creditor, the property of the principal debtor: here this was not and could not be done. It is also required of the surety, to furnish a sufficient sum to have the discussion carried into effect; no such thing, of course, was or could be thought of here. Finally, the discussion of the property

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of the principal debtor cannot be required, when such debtor has become a bankrupt. *Febrero de escr. 4, 5, n. 124*; nor even where the principal debtor is notoriously poor. *2 Gomez's var. addit. to chap. 13, n. 15.—Lopez on Part. 5, 12, 9.*

We are upon the whole satisfied that this action is well supported, and that the plaintiff ought to recover.

It is, therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Cuvillier for the plaintiff, *Morel* for the defendants.

SMITH vs. *KEMPER.*

If the statement of facts be so imperfect, that the court cannot from it, discover the merits of the case, the appeal will be dismissed.

APPEAL from the court of the fisrt district.

DERBIGNY, J. delivered the opinion of the court. In this case, the settlement of old and intricate accounts had been referred in the inferior court. The referees made a report which was set aside, it is not seen upon what ground. The court afterwards pronounced judgment, allowing to the plaintiff nearly the same sum which the referees had found; and we are now called upon

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to say, whether this judgment was correct. But in the paper, called a statement of facts, which comes up with the record, there is nothing that can enable this court to understand the accounts on which the parties are at variance, nor what are the points on which the appellant may wish to obtain a decision here. The accounts were originally submitted to referees, with the power to summon and hear witnesses, and to call for the production of documents and papers. No traces remain of what has been proved before them; and of such vouchers as are contained in the record, only a part is recognized in the statement of facts. The case is in such a situation that we find it impossible to adjucate upon it.

It is ordered, that the appeal be dismissed with costs.

Moreau for the plaintiff, *Duncan* for the defendant.

CUVILLIER vs. *M'DONOGH.*

The tradition of real estate may be made by the consent of the vendor, that the vendee take possession.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The petition states that the plaintiff, in

the month of July last, purchased from the defendant, four squares in the town of McDonogh, and the defendant refused to put him in possession, whereby he has sustained great injury, and concludes with a prayer for a rescission of the sale and damages.

The answer admits the sale, and denies that the defendant ever refused to put the plaintiff in possession.

There was judgment for the rescission of the sale, but no damage was allowed, and both parties appealed.

The evidence shews that the plaintiff, some days after the sale, applied to the defendant to be put in possession, when the defendant appointed the next day: that the plaintiff neither came nor sent on that day, but on the following sent a man, who found the defendant's surveyor laying out the streets of the town, who said that, the square bought by the plaintiff, being in the rear, their lines could not be run for some time: when the plaintiff's agent went to the defendant, who told him that, if the plaintiff came or sent on the next day, he, the defendant, would go and draw the lines of his squares. The plaintiff, on this being reported to him, replied he would not go nor send, as the defendant, being no surveyor, might draw the lines incorrectly and subject

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him to law suits. He afterwards wrote to the defendant, demanding a rescission of the sale.

There was evidence of the plaintiff speaking to some slaves, who promised to come on the following Sunday and cut wood for him, bringing others to a considerable number, and that the defendant offered him some of his negroes to hire for the same purpose.

The sale was made on a plan, on which the squares are marked and numbered. Two streets were actually run, and the defendant's surveyor was, it appears, employed in completing the survey, when the plaintiff made application. In order to perform the work with correctness, it was necessary to proceed regularly, and survey the squares in the order in which they lay. There was no neglect, therefore, on the part of the defendant, in effecting the survey in such a manner as would do justice to all his vendees. He offered to go himself and survey the plaintiff's squares, if he would be satisfied with his doing so, but this was refused. The plaintiff might have known with a little trouble, which the defendant offered to take for him, the squares sold to him, by a recourse to the plan. *Id certum est, quod certum reddi potest.*

The defendant consented that the plaintiff should take possession, since he offered to attend him for that purpose, and to hire him negroes to

cut wood on the squares, and our statute provides that the tradition of real estate may be made by the consent of the vendor, that the vendee should take possession, *Civ. Code*, 350, *art.* 19, so that the tradition has actually taken place.

It appears to us that the judgment of the parish court, rescinding the sale, is erroneous. It is, therefore ordered, adjudged and decreed, that it be annulled, avoided and reversed, and that there be judgment for the defendant, with costs in both courts and on each appeal.

The plaintiff *in propriâ personâ*, *Turner* for the defendant.

DE ARMAS & WIFE vs. *HAMPTON.*

If by a contract of marriage, land purchased with money reserved as part of the dower, may be sold by the husband with the wife's consent, land in common between the wife and her children by a former marriage, and adjudged to her,

APPEAL from the court of the second district.

MARTIN, J. delivered the opinion of the court. The defendant being sued for the payment of a tract of land purchased from the plaintiffs, and which is admitted to have been part of the property of the wife's first husband, refuses it, because the vendors were not duly empowered by their contract of marriage, to sell the premises. There was judgment for them and he appealed.

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at its valuation, cannot be sold under the contract.

The record shews, that by the 6th article of that instrument, it is provided that, "when the wife shall have consented that the sums, which she and the husband may receive, as part or the whole of her dower, be laid out in real property or slaves, he shall not be capable of selling or mortgaging the same without her consent, expressed in the act." By the same instrument, she constituted all her present and future property as her dower.

After the marriage she, duly authorised by her husband, obtained a valuation of the real estate and slaves, which were of her first husband, held in common between her and their children, and with the consent of the family meeting, and her then husband's, caused such property to be adjudged to her, at the valuation.

Now at the date of the marriage, she held an undivided portion of the real estate, the whole of which was adjudged to her, and that undivided portion made part of the dower. The contract does not allow the sale of any real estate, part of the dower at its date, but only of such real estate as may be purchased with any money, of the dower, as may come to her hands or those of her husband.

The portion of the children, which was adjudged to her, was not an acquisition with any money proceeding from or received in part of her

dower. For any thing that appears on the record, the price became, according to law, payable at the majority of the children with interest.

The district court erred, in giving judgment for the plaintiffs.

It is therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the plaintiffs pay costs in both courts.

Workman for the plaintiff, *Duncan* for the defendants.

DODGE'S CASE.

APPEAL from the court of the first district.

If a defendant in execution be discharged on an *habeas corpus*, the plaintiff may appeal.

If the plaintiff fails to make the advance required by law, for the support of a defendant, in execution, the latter cannot be discharged *ex parte*.

MARTIN, J. delivered the opinion of the court. This man caused himself to be brought before the district court, by a writ of *habeas corpus*. By the return of the jailor, it appeared he was committed on an execution from that court, and admitted to the bounds of the prison, having given bond and security according to law. The sheriff and jailor made oath, that the plaintiffs, in the execution, had not paid in advance, or otherwise, the sum required by the act of Feb. 7,

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1817, § 5, whereupon he was discharged and the plaintiffs, in the execution, appealed.

It is contended, that no appeal lies from a discharge on a writ of *habeas corpus*: as the proceedings thereon are of the most summary kind, and cannot be suspended or delayed by an appeal. They may be, and often are had, at chambers before a judge, and an appeal is said to lie only from the judgment of a court.

Secondly, that the prisoner was rightly discharged.

I. It appears to us, that the writ of *habeas corpus* was improperly resorted to. The appellee was under no physical restraint, and there was no necessity to recur to a court or judge, to cause any *moral* restraint to cease. The sheriff did not detain him, since he had admitted him to the benefit of the bounds: the doors of the jail were not closed on him, and if he was detained, it was not by the sheriff or jailor. If his was a *moral* restraint, it could not be an illegal one.

The object of the appellee was, therefore, not to obtain the removal of an illegal restraint from a judge, but the declaration of the *court*, that the plaintiffs in the execution had, by their neglect, lost the right of detaining him. A judgment declaring such a neglect, and pronouncing on the

consequences of it, was what the appellee had in view. The correct and ordinary means of obtaining it, was by bringing the plaintiffs in the execution into court, in order to have the neglect complained of contradictorily pronounced therein. If this mode had been pursued, the decision of the district court would certainly have been liable to be examined in this court. Is it less so, because the same decision has been obtained, without giving to the plaintiffs in the execution the opportunity of being heard? We think not.

II. It is contended, that on the failure of the plaintiffs to make the advance, the appellee was *ipso facto* discharged, and the jailor had no longer the right of detaining him. As he had given security, and been admitted to the bounds, the jailor could not legally detain him, *before* the neglect. If he was *ipso facto* discharged, from the obligation of remaining within the bounds, he needed no *habeas corpus*. He was at liberty to go wherever he pleased. From his applying to the court, we are to infer, that he believed his discharge by the court necessary. Before the court could discharge him, it was bound to inquire into the correctness of the fact alledged, and to determine the legal consequences of it. The party, whose rights were to be affected by

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the decision of the court, had a right to hear the allegation and proof, and to be heard in disproving it, and in shewing that the consequences of it were not those on which the adverse party insisted. The court erred in proceeding *ex parte*.

It is therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, at the costs of the appellee.

Duncan for the appellant, *Livingston* for the appellee.

WOODWARD & AL. vs. *BRAYNARD & AL.*

No judgment can be given against a party who is not in court: nor any final one, till an answer filed or judgment by default taken.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The plaintiffs, endorsers of a note of Braynard, not yet payable at the inception of the suit, averring he had secretly departed, removing out of the state all his property, except sixty one hogsheads of rum, attached by V. Rilieux, prayed an attachment thereon, alledging they were sufficient to satisfy his and their claims. It was accordingly obtained and levied.

H. B. Morse, and J. Brandt and co. were made parties to the suit as garnishees.

Morse answered he was not accountable for the rum, as it did no longer belong to Braynard, from whom he had purchased it, for a valuable consideration.

J. Brandt and co. denied all the facts stated in the petition, and added, that they were then, and at the time of the attachment, the true and lawful owners of the rum, and in possession of it.

By consent, the rum was sold, and the proceeds were deposited in the hands of J. Brandt and co. to await the determination of the suit.

V. Rilieux, J Walton, J. R. Roans, J. Cole and J. Musson, having also brought suits against Braynard and J. Brandt, and co. against the sheriff, their agreement was entered on record, that the question, of the right of property to the rum, should be binding as to that right, in all and each of the above causes.

The court appointed an attorney to Braynard.

Judgment was given that "the transfer of the property, since attached, having been made by Braynard, in a suspicious time, when he was not only in failing circumstances, but preparing secretly to absent himself, was null and void." The plaintiffs had judgment against Braynard for the amount of the note, but, in sustaining the attachment, the court reserved the right of the holders of the rum for the freight, storage and necessary expenses.

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From this judgment, Morse and J. Brandt, and co. appealed.

There was no statement of facts, but the parish judge certified that the whole evidence before him was spread on the record.

From this it appears M'Neil, Fisk and Rutherford, who were directed to be made parties to the suit, were never cited and the attorney appointed to Braynard did not act, so that there was not any answer put in for, nor any judgment by default taken against, him.

The other facts in the case are these: some time in the summer of 1818, Braynard had seventy one hogsheads of rum consigned to him, and endorsed the bill of lading to S. A. Woodberry and co. a firm of which H. B. Morse is a partner; being arrested for a debt of about $800, Braynard proposed to one Terry, to bail him and offered as a means of indemnification, that the bill of lading should be endorsed to him, by S. A. Woodberry and co, which was accordingly done. A few days after Terry agreed to endorse the bill to J. Brandt and co. on they relieving him from the bail. This was accordingly done, and the latter having taken an assignment of the bill of lading, entered the rum at the custom house, and took possession of it. The record does not enable us to ascertain the exact dates of these transactions.

On the 12th of August, 1818, Braynard gave a power of attorney to Morse to transact his business, and three days after sailed for Boston. At this time, he was apprehensive of an arrest, having endorsed notes to a considerable amount, for persons who had since failed, and Morse told one of the subscribing witnesses to the power of attorney, that Braynard meant to make a difference between the payment of these notes and his other debts.

On the 10th of August, Braynard signed a receipt, for the amount of the seventy-one hogsheads of rum, to S. A. Woodberry and co. On the 13th, an account current, between him and them, exhibited a balance due the latter (the rum being accounted for) of $2843, with a reserve of $2735, due by him to J. Brandt and co.

On the 15th, the day of Braynard's departure, the rum was attached, in the hands of J. Brandt and co. at the suit of V. Rilieux, by whose consent it was left there, on they giving a receipt to the sheriff, acknowledging it to be the property of M'Neil, Fisk and Rutherford, who had stored it with them, and who held their receipt. On the 29th, the rum was attached in the present suit.

It appears to us, that the parish judge erred, in giving judgment against Braynard, as there

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was no answer filed by the attorney appointed to him by the court, so as to present an issue to be tried, and as there was no judgment by default taken against him. The judgment is therefore annulled, avoided and reversed.

Proceeding to determine what judgment ought to have been given below, it appears to us, that the defendant Braynard was not before the court; no property of his was in the custody or power of the court. By the endorsement of the bill of lading to S. A. Woodberry and co. by Braynard, and by that house to J. Brandt and co. the property of the rum passed out of Braynard, and it appears, that the proceeds have been fairly applied to the payment of the freight, duties and charges accruing on the rum, and the discharge of the debts due by Braynard, to J. Woodberry and co. and J. Brandt and co. But, it is contended, that at the time, when he assigned the bill of lading, he was in insolvent circumstances, in the knowledge of S. A. Woodberry and co. was pressed by his creditors, and had not sufficient property in the state to pay his debts therein. This does not, in the opinion of this court, render the assignment absolutely void: for it was necessary to the payment of the duties, freight and charges on the rum; further, it was not made without consideration, since J. Brandt and co. became bail for the assignor. On the

subsequent failure of Braynard, the mass of his creditors might perhaps compel S. A. Woodberry and co. and J. Brandt and co. to bring into the common stock the balance of the proceeds of the rum, after deducting the amount of the freight, duties and other charges, in order that it might be distributed among all the creditors, including these two houses: but, no particular creditor has a better right to this balance than them. It would be equally unjust, that the present plaintiffs should receive any more than their proportion, or obtain the whole of their debt, as to allow the proceeds to remain where they are. If the present holders are to account, they must do so to the mass, and not to any individual, of the creditors of Braynard.

It is, therefore ordered, adjudged and decreed, that the plaintiffs' petition be dismissed, and that they pay costs in both courts.

Morel for the plaintiffs, *Workman* for the garnishees.

PIERNAS vs. *BLANQUE'S SYNDICS.*

APPEAL from the court of the parish and city of New-Orleans.

The opinion of the court *a quo*, in admit-

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PIERNAS *vs.* BLANQUE'S SYNDICS.

MARTIN, J. delivered the opinion of the court. The petition states that the plaintiff, being in need, applied to Blanque, who loaned her the sum of one thousand dollars, and she, being willing to secure him by a mortgage of three slaves, whom she possessed, he availed himself of her necessitous situation, of the influence he possessed over her, and the confidence which he enjoyed as her brother-in-law, and induced her to execute an absolute bill of sale, instead of a mortgage—that two of the said slaves were then hired to the wife, now widow of said Blanque, in whose possession they have ever since remained, and the other was then, and has ever since been in the possession of the plaintiff—that the said Blanque. ever after continued by fair promises to avoid a settlement with the plaintiff, as well for the hire that was due her for the said slaves, during a long period before the loan and ever since, as for other sums, in which he became indebted to her, and died insolvent, before any settlement could be obtained from him. The petition concluded that the defendants may come to settlement, and on receiving the balance, if any be due, be for ever enjoined, &c.

Annexed to the petition, were two notes from Blanque to the plaintiff, posterior to the date of the instrument, by which he begged the use or hire of the slave, who remained with the plain-

ting a wirness, must be tested, according to the circumstances of the case, when it was given.

If by consent, a witness be introduced to prove a fraud, but discloses facts, of which parol proof can only be admitted to establish fraud, and there is a special verdict, that there is no fraud, and facts are found, which demand the judgment of the court, in favor of the party introducing the witness, if the adverse party does not insist on a new trial, he cannot be relieved on the ground, that the testimony ought to have been listened to so far only as it tended to establish the fraud.

tiff, and a note of L. B. Macarty, a brother-in-law of Blanque's, and concerned with him in a plantation, conveying an intimation that his father, Blanque's father-in-law, desired to purchase the same slave, desiring to know his price, &c.

The case was submitted to a jury, who found specially, that the bill of sale was not fraudulent, but a security for the loan—that the slaves were worth double the sum loaned—that one of the slaves continued to remain with the plaintiff without any claim being made to him by Blanque—that he was at times hired out by the Chevalier Macarty, father in-law to Blanque, to work on an estate in which he and Blanque were jointly concerned, and the Chevalier's son, applied in his father's name to the plaintiff, for the purchase of the slave, offering $1200—that Blanque accounted with the plaintiff for the hire of the three slaves, including the one hired for the plantation. That four years after the date of the sale, Blanque exhibited an account against the plaintiff, in which he made no charge, for the hire of the slave sold, which remained with the plaintiff, and on the same day, she rendered an account to Blanque, which she receipted, in which she charged him with $848,50 for the hire of the said negroes, to which he made no objection.

There was judgment, that on the plaintiff pay-

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ing to the defendant the sum loaned, with interest, the act of sale be cancelled.

The defendants appealed, there was neither statement of facts, nor any certificate of the whole evidence being on the record.

But it appeared, by a bill of exceptions that, at the trial, the plaintiff's counsel offered witneses to prove the meaning of the parties, when the bill of sale was made, the defendants objected to any witness being introduced except to prove fraud, and the court overruled the objection.

The record shews that, after the verdict, the defendants moved for a new trial.

1. Because the verdict was contrary to law.

2. Because, no evidence could be admitted, except as it tended to shew the fraud alledged, and as the evidence produced tended only to shew the intention of the parties, at the time of the contract, it was admitted in direct violation of the law.

The counsel, afterwards, withdrew the motion as it was his intention to appeal.

The facts being especially found by the jury, and, the judgment of the court correctly given thereon, we have only to enquire, whether the court erred, in suffering the witnesses excepted to, to be sworn, and all the facts, on this point, must be taken from the bill of exceptions.

The defendants' counsel, according to his own

shewing, did not oppose the introduction of any witness to prove the fraud alledged; the plaintiff's counsel only prayed, that witnesses might be heard to prove the intention of the parties, in executing the deed. Now, no fraud could be proven against Blanque, according to the allegations of the petition, which charge fraud only in refusing to give a defeasance or counter letter, without shewing the intention of the parties, at the time of the execution of the deed. If the plaintiff prayed to prove that intention by witnesses, and the defendants consented that the fraud alledged might be proved by witnesses, they agreed to what the plaintiff proposed, and the judge could not reject evidence of the intention of the parties, without rejecting evidence of the fraud, which both parties were content should be produced: we are, therefore of opinion, that he did not err in this respect.

But, it is contended, that the finding of the jury, that there was no fraud intended by Blanque in taking the bill of sale, alters the question, and since it is apparent that no fraud did exist, the testimony was improperly admitted.

In testing the correctness of the judge's conduct in admitting the evidence, we are to examine the question, as it stood, when he gave his opinion. Both parties agreed to the same proposition, tho' in a different manner: the defendants agreed tha

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witnesses should be examined to prove the fraud—the plaintiff, in order to prove the fraud, sought to establish the *sine qua non*, viz: that the parties meant not to have a sale, but a mortgage executed.

Whether, after the jury found there was no fraud, there ought not to have been a new trial granted, or whether before the verdict, the jury ought to have been charged, that if no fraud was practised to obtain a bill of sale, a part of the said testimony ought to have been rejected, is not a proper subject for our enquiry. For the motion for a new trial was withdrawn, and none appears to have been made for the judge's direction to the jury. Our attention must be confined to the bill of exceptions, taken on the admission of the parol testimony; for we are bound by the special verdict, and if we were not, we find that the jury had before them written evidence to support their finding, viz: that resulting from the low price, mentioned as the consideration—the account of the insolvent in which, no hire was charged for the slave whom the plaintiff retained, and the account of the plaintiff, in which the insolvent was charged several hundred dollars, for the hire of the negroes he held, and finally, the note of the insolvent, in which one of the slaves mentioned. in the bill of sale, is considered as still the property of the plaintiff.

We are of opinion, that the defendants, having consented to the introduction of parol testimony to prove the fraud, cannot complain that the judge allowed such testimony to go to the jury, and that the parties contemplated no transfer of property, but only the security of the defendants' insolvent in the loan he was about to make.

It is therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Smith for the plaintiff, *Ellery* for the defendants.

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APPEAL from the court of the first district.

The dissolution of a partnership does not prevent the partners from suing.

If the agent evidently meant a voyage to a certain place, and the principal one to another, their error prevents any contract of mandate from taking place.

Livingston, for the plaintiffs. This is a suit brought against the defendants, as the plaintiffs' agents, for neglecting to make insurance on a vessel, the property of the plaintiffs, according to order and to promise; by which the plaintiffs incurred a partial loss.

If the facts of the order, of the promise to comply with it, and of the loss be proved, the plaintiffs must recover. The law does not seem to

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be disputed; and if it were, it is too clear to need any reference to authority to its support.

The act of the principal, ratifying that of the agent is to be liberally construed.

I The order and the promise to comply with it, are proved by the same testimony: and it is clear and decisive.

1. The testimony of Dr. Little. He heard the consultation, respecting the propriety of getting insurance between the plaintiffs and one of the defendants, he remembers the reason given by the defendant Finlay, for advising the measure; he perfectly recollects the order and the promise to comply with it; and that the defendant told the plaintiff, he need not provide the funds for the premium, that he would take care of it.

2. The confession of the other defendant, Flower, to captain Fisher, that orders had been given to insure, and that he either had complied or would comply.

This testimony being full and conclusive, proving the order and an express promise to effect the insurance by one partner, and an acknowledgement by the other, that such orders had been given, and that they would be complied with—nothing was left for the defendants, on this point, but to impeach the credibility of the witnesses. This has been done with a patience and perseverance, that seemed to increase with the improbability of success.

To Little, it is objected that the reason, given for insuring the voyage back, was one that could not have existed; and that, therefore, he *misrecollects*. Now, if this be so, instead of recollecting ill (which, I believe, is the idea intended to be conveyed) the witness must be guilty of direct and deliberate falshood. For it is impossible that he could suppose such a circumstance to have been mentioned, if it never was.

And in truth, this circumstance is a strong internal mark of veracity, and would serve to corroborate the testimony, if it wanted support. The conversation took place, when Marsh was in town: he left it, if I recollect right, on the 17th. The vessel was then shortly to sail, and by the instructions was immediately to return. A voyage to Norfolk is frequently performed in 12 or 14 days, which would bring her there, counting from the time of her actual departure the 23d, on the 10th of March; and if she met with only ordinary delay, she might be ready to return before the 21st, the very day of the equinox. But as the gales prevail for a month or more after that period, she would, on the largest calculation, be exposed to them.

It is said, that he is contradicted by our other witness, captain Fisher, because this latter *does not know whether the orders were verbal or written, positive or discretionary.* If captain Fisher

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had said, that he was present at the conversation related by Little, there would, even then, have been no contradiction; because one witness might have heard what escaped the other. But when all the information Fisher had came from Flower's confession, it really seems rather extraordinary reasoning to say, that the first witness, who heard the conversation, must be mistaken, because the defendant did not choose to relate the whole to the second.

The other objections to the positive testimony in this cause, may be reduced to one:

That it is improbable.

1. Because, the defendants had no inducement to be guilty of the negligence imputed to them—to which I answer, that whatever be the motives, or whether any exist or not, if the fact be proved, we are entitled to relief. Men are guilty of neglect without any motive; if they had any, it would not be neglect but design.—It is both the interest and duty of an advocate, to attend strictly to the cause of his client. Yet, where is the lawyer, however diligent or correct, who can say, that he has not sometimes been guilty of inattention to his duty?

2. Because the defendant declared, at the insurance office, that his orders were discretionary, and that he would not insure, because the premium was too high. Now, admit the novel princi-

ple, that the defendant is to make testimony for himself, and what is the result? Why, that he is equally liable as if his orders had been positive; for this plain reason, that if he refused to insure, because the premium was too high, it was his duty immediately to have given notice to his principal, that he might have got the insurance elsewhere. This is expressly stated in the authority read to the court—that in cases where the factor receives orders which he does not think prudent to execute, he must immediately give notice to the principal.

The court will also judge, how far this application to insure is consistent with the denial, first, strongly implied by the interrogatories and the affidavit, stating the substance of the testimony which we admitted to be true.

3. It is improbable, because the parties made no complaint at not finding the charge for insurance in the account.

This is no evidence, that Terril who received the account ever examined it, nor that he knew of the orders to insure—besides, generally people do not find great fault with the omission of a charge against them, even where they discover it—and he might have thought that the premium was paid, as I believe it actually is, by a note, and that it would be charged when the note was paid.

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4. It is highly improbable, that the orders were given, "because Marsh, who gave them, made no reproach against the plaintiffs to the person who brought him the intelligence;" and in the record the very formula of exclamation is given by the defendants' counsel; he ought to have cried out, "*good God! Is it possible?*" and because he did not cry out *good God!* it is clear that he never ordered the insurance.

5. Another probability arises, from the plaintiffs' continuing to employ the defendants as their factors, after they knew of the loss.

This may be accounted for in several ways—by supposing that the continuance of the business was more convenient to the plaintiffs, than the change of it into other hands, at the moment when the partnership was about to cease—by supposing that they did not think the omission to insure proceeded from any evil design—or by supposing that they were really ignorant of the liability of the defendants, by reason of the neglect.

6. The want of written instructions is also urged, as a reason to believe that none were given.

The clerks, I believe, swear that it was usual for the defendants to take such instructions *in writing*, but, surely a man can never set up his own usage and custom, in bar of a suit against

him: a custom he was at liberty to follow, or break alternately at his pleasure, and which (independent of the instance in question in this suit) we have abundant proof, that the defendants did not always adhere to.

They insured the cargo of this vessel, without any written instructions—" but the owner was on the spot, say the defendants; this forms an exception to the *customary common law* of our compting house." Be it so. We do not pretend to be acquainted with all the doctrines of this important code. But if it be an exception, we claim the benefit of it; for when we gave the instructions, we were also on the spot.

But you must make another exception to exclude us: for you confess you had orders to insure, and that you made an attempt to execute them; but that they were *discretionary*. Here then, is another exception in this customary law, not given to us by the text of the learned commentator Crocker. In the next edition, we hope he will add a note, stating that only *positive* instructions were required by the custom to be in writing, lest future students might be misled. And I would here, most respectfully suggest to the court, if they should sanction this custom, that they would recommend to every factor, the publication of the custom of his compting house, with notes and commentaries, in the same way,

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that the different customs of France were given to the world, before the Napoleon Code. This would somewhat load the shelves of our libraries, but we should be amply indemnified, by the increase of suits on our docket.

The defendants *must*, and I am sure the court gladly *will*, excuse us from making any further reply to the other suggestions, why the positive testimony of two respectable and unimpeached witnesses should not be believed. Their testimony is too full, too circumstantial, too positive to admit the idea of inaccurate recollection. The circumstances they detail are such, as never could have been impressed on the mind, by erroneous comprehension. The testimony is either true, or wilfully false—and, even if the defendants should have succeeded in convincing the court (which I cannot believe) that it is *improbable*, it does not follow that it is *untrue*.—*Le vrai peut quelquefois n'être pas vraisemblable*, has grown into a proverb, and its truth must be acknowledged, as applied to the actions of men, until they shall always be guided by truth, by reason, and the natural course of events: when they are, there will be no occasion for the rules of evidence, for the ingenious comments that have been offered on them, or for the ministry of your honours, or the advocates who address you. But until they are, we must look

for truth in the evidence of what is, not of what ought to be.

II. Having, as we hope, established the orders to insure, the promise to comply, and the failure to fulfil them, we have only to shew the *interest of the plaintiffs* and the *loss.*

The first is proved by the captain, by the agency of the defendants, by their accounts charging us with disbursements, by the copy of the register in the Spanish proceedings, the original being by law of the U. S. directed to be returned to the office whence it issued—and the point is the only one I believe, that is not controverted. The second, *the loss*, is also proved by captain Fisher, by the gentlemen who purchased the vessel at the Havana, and by the proceedings in the Consulado there.

The amount of that loss was nearly a total one; but the jury by deducting the charge for wages, to which we had no right, and placing to our account, the sum deposited at the Havanna, have liquidated the amount very correctly at 4300 dollars.

But the defendants say: "that as we have made no abandonment, we cannot make them liable for a total loss, that they are liable, if at all, only to the extent, and in the manner that insurers would be."—If there were any necessity

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for contradicting this position, I think it might safely be done in this case, where the factors are the insurers, because if they had made the insurance, it would have been their duty to have abandoned to the underwriters, for their principal; whenever his interest required that step. But in the case, where the factors and insurers are the same person, they cannot, as insurers, take advantage of their neglect, as factors to abandon—and this idea is strengthened, by the omission in all the authorities of any mention of the necessity of abandonment, in suits against a factor for neglect to insure.

Interest and *loss* must be proved; because without *both* of them there is no *injury*, and without it there can be no *action*.

However, whatever be the law on this point, it is immaterial in this suit, for we do not sue for such a total loss as requires abandonment, it is required in cases only, where the loss is constructive; but where the actual loss amounts to the whole value of the thing insured, no abandonment is required; because there is nothing to abandon. Or where there is only a small part left, and the owner is willing to keep that on his own account, he has no need to abandon.

When he wishes to turn a partial into a total loss, then if the loss be of sufficient magnitude he may abandon; and he *must* do it before he

can put the insurer in his place. But if he do not abandon, the only consequence is that he can only recover according to the amount of his loss.

Here, we made no abandonment: but we sue only for the loss actually sustained. We thought we could prove that to the amount of 5,000 dollars, and we accordingly claimed that sum; but we could prove to the satisfaction of the jury, only 4,300 dollars. Is there any principle of law, which prevents our recovering it? I never heard of any.

But if we had gone for a total loss, and suggested an abandonment and failed in the proof of it, we should still be entitled to recover for a partial one, to the amount we may have proved.

I could answer most completely and satisfactorily all the charges of neglect brought against the captain after his arrival at the Havana. The slightest attention to his proceedings there will shew that he acted discreetly—without funds, in a foreign port, he wrote to his owners, and repeatedly to their factors, the defendants, he waited a considerable time for their answer; but not receiving it, he acted with the property, as he would with *his own*; for that is the meaning of the advice which he received and followed; to act, *as if the property was not insured*: which, though criticised by the defendants, was the only legal course, he could pursue, having only been cur-

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sorily informed on his departure, that the vessel either *had been* or *would be* insured. Though he might *believe*, that it was done, he was not and *could not* be certain of the fact. In this situation, by acting as if she was not insured, he did his duty to his employer, if he was uncovered, and consulted the interest of the insurer, if she was insured.

This want of advice from New-Orleans is the reason why he did not apply to the Consulado, until some time after his arrival. When he lost that hope, he applied to the proper tribunal, and took no step, but under its authority. There the vessel was sold, and all the accounts and expenses audited and paid.

There was therefore no neglect after the arrival of the vessel, on the part of the captain.— But if there had been, how could it affect the present question? If the loss *is occasioned* by neglect or want of skillfulness of the master, there are cases where it exonerates the insurer.— But the loss here was by lightning; and if he had abandoned the vessel, immediately after her arrival and gone to the East-Indies, without giving any advice to those concerned, the insurers would have been liable for the actual damage, whenever we could prove the amount.

That amount is, as I have shewn, sufficiently proved in this case. The wages which were

claimed were properly rejected by the jury; and instead of 5,000 dollars to which we supposed we had a right, they have given us only 4,300, which may be made up without including any objectionable charge.

"The captain ought," say the defendants, "to have made a protest," he *did* make one, as appears by his declaration to the Consulado.

"But he ought also to have produced it." For what purpose? It could not be introduced as evidence for him, if he had; and if the defendants wanted it, they ought to have sent for it themselves, or at least have given us notice to produce it. In the case cited from 9 *Cranch*, 79, the doubt was as to the necessity of putting in, here there can be none, because the damage to the vessel is most fully and clearly proved. Unless, indeed, the defendants mean to argue with respect to the ship, as they have with respect to the instructions: that it is highly improbable, notwithstanding the positive evidence, that she was struck by lightning; because out of 100,000 vessels, not more than one meets with that accident, and that it is therefore one hundred thousand to one (fearful odds!) that the story is false. Besides the ship had a most excellent character for going safe and it was her custom to go without insurance. Therefore there are strong circumstances to induce a belief

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that she was not insured, and that she met with no accident. and "as a presumption, which necessarily arises from circumstances, is often more convincing and more satisfactory than any other kind of evidence", therefore, the lightning did not strike the brig, which was to be demonstrated.

A most extraordinary attempt is made to insinuate from the expression in the Spanish proceedings describing the vessel as "*procediente de Perth Amboy*," that there had been a deviation. Now, as this is only the language of the tribunal, it would seem hard to make captain Fisher answerable for their expressions, in a foreign tongue, even if they had meant to say that he *came* from Perth Amboy. But it plainly relates to the port to which the vessel belongs, as by the register, it will be found that she is of Perth Amboy, that is to say, belonging to, registered at, that port.

"How is this presumption, (that he came from Perth Amboy) to be got over" asks the defendants' counsel.

Only by that testimony, which it is his interest, throughout this cause, to consider as the worst, because he has none on his side—by positive testimony.—That of the captain, that he took in the negroes at Norfolk—by the delivery of the negroes at the Havanna—by the payment of

the freight for them to the defendants themselves.

I shall add nothing more; to examine all the objections made by the defendants, would take up more time, than I can bestow on this cause, and to treat them all seriously would require a greater stock of gravity than I possess. Indeed, I feel as if an apology were necessary for the light manner in which some have already been treated.

III. Merely from that attention due to the defendants, I must notice their first objection that this suit cannot be sustained, because we have called ouselves *Terrill and Marsh.* But as we have also let the defendants into the secret of our respective christian names, and written very plainly that it was Abel Terrill and John F. Marsh, who chose to call themselves Terrill and Marsh. I cannot very readily, I confess, see the weight of the objection: authorities were read in support of it, to shew that one partner cannot legally sign the joint firm after a dissolution; or bind the former partner, if he do. This is certainly very true: but how does it apply to a suit brought by two partners to recover a sum of money due on account of a partnership transaction, and brought too in their names at full length?

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Even in the case cited of the signature of the firm, after the dissolution of the partnership, if the signature had been made by the authority of both, can there be a doubt that it would have bound them?

I own, I can comprehend nothing from this objection, except that the defendants found it necessary to make one—and then, if it do not defeat itself, it must stand, for I shall say nothing further to defeat it.

I conclude with the hope, that as this cause has been tried, and the amount settled, by a special jury of merchants, summoned to try a mercantile question, that their decision will have some weight; but that the facts in the cause will have more, and that the judgment of the district court will be affirmed.

Ellery, for the defendants. Were the plaintiffs' case made out, they could not succeed in this form of action; inasmuch as it is brought by an expired firm, instead of being brought by the partner, or person charged to wind up the concerns of that firm.

The petition in this suit, is entitled the petition of Abel Terrill and John T. Marsh, trading under the firm of Terrill and Marsh, of the parish of St. Martin, &c.

These words are obviously, not intended as

words of description, but to give the character of the petitioners, and shew in which capacity the suit is brought :—that it is brought by them, not as distinct individuals, but as composing the firm of Terrill and Marsh. Now, there is no such subsisting firm as that of Terrill and Marsh; and from the testimony, we find, that it was dissolved prior to the institution of this suit. This appears by the cross examination of Little, as well as by the admitted testimony of Jennings. This suit therefore, stands in the name of an expired firm, instead of that of its acting or surviving partner: in other words, it stands in the name of a non-entity. As well might the individuals, who composed a corporation, the charter of which is expired, continue notwithstanding to sue in its coporate name, as those who composed a firm now expired, in its partnership name. After dissolution of partnership, the relations of the partners in the one case are as much extinct, as those of the corporators in the other; the joint-tenancy existing between them in the partnership effects is dissolved, the partners cease to exist as such, and become distinct persons; and it is difficult to conceive, upon what legal principle, or by what resuscitating process, they are thus made to revive and re-unite as partners and plaintiffs in the present action. If after the dissolution of partnership, they are still permitted to

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sue as a firm, why not to perform any other partnership act? If they can put the partnership name to a suit; why not to a note, bill, or obligation. Yet, this has repeatedly been decided, cannot be done. 3 *Epinasse's. Rep.* 109, *Abel and another* vs. *Sutton*. 2 *Johns Rep.* 300, *Lansing* vs. *Guire & Ten Eycke*.

Go the length of admitting the use of the partnership name, after its dissolution, and where are we stop? By which of the partners is it to be used? Terrill and Marsh are now distinct persons, holding several interests, the one is no longer bound by the acts of the other, neither Terrill nor Marsh can separately use it in this suit; both must concur in bringing it, and that concurrence must be shewn; it cannot be presumed; the dissolution of the firm excludes such presumption. But would even their concurrence be sufficient, without a renewal of the partnership. Suppose a judgment in their favor, by whom is satisfaction of judgment to be signed, and how are they to concur in the partnership signature: and in case of a judgment against them, and execution for costs; upon what property is it to be levied? And where is to be found the property of an unsubsisting firm?

Again;—can they begin the suit as partners, and recover as distinct persons? Can they sue as joint-tenants and recover as tenants in common?

Suppose the plaintiff in a suit die, will the court suffer it to be continued in the name of a deceased person? As little then will it suffer a suit to be brought, and carried on in the name of a deceased firm; the one must be conducted by the executors or administrators, and the other by the acting or surviving partner.

It is said, that this objection comes too late, and that advantage ought to have been taken of it, in a plea of abatement. But the dissolution of this firm was a private and not a public one, and we were accidentally brought to the knowledge of it, by the testimony of one of their witnesses, taken under a commission, issuing a considerable time after filing our answer. The plaintiffs are not however, put upon worse ground. Had such a plea been filed, it would have been tried with the principal defence. But our proceedings do not require, perhaps not warrant, such a a plea: they are not copied from the common law, but chancery proceedings; where, instead of a plea in abatement, an exception is taken to insufficient parties. In our answer, adopting this practice, we save to ourselves all benefits of exception; and this exception, surely comprehended in this saving, was on the trial below specifically argued.

I therefore conclude, that as the plaintiffs have brought this suit in the name of an expired firm,

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instead of that of the acting or surviving partner of that firm; they are not entitled to recover in this form of action; that the suit is not well brought, and that judgment must be entered against them as in case of nonsuit.

II. Admitting the suit to be well brought, the defendants' instructions, to effect insurance upon the vessel in question, did *not* extend to her voyage back, and were *not* positive, but discretionary.

The plaintiffs hold here the affirmative of the proposition, and aver, that the orders to insure *did* extend to the return voyage, and *were* positive and not discretionary. Now the affirmative is always susceptible of direct proof, but the negative which we take, in its nature not admitting of direct proof, can only be made out by the proof of circumstances, inconsistent with the affirmative averment: and we contend, that every material circumstance in the cause is inconsistent with it. The affirmative of the proposition is sought to be supported by the testimony of Little and Fisher, master of the vessel. The testimony of the latter, as I shall presently shew, is neutralised by his letter to defendants from the Havanna;—by his acknowledgement, in his cross-examination, that *he never heard any mention made of insurance upon the voyage back*, and

that he does not know whether the instructions to insure were *positive or discretionary*. The affirmative may fairly then be considered as resting principally, if not exclusively, upon the testimony of the former witness. This testimony, as I shall presently shew, is not only weakened by intrinsic objections, but opposed by the whole array of circumstances in the cause; and however positive in its nature, is overpowered by the presumption necessarily arising from these circumstances. Neither am I inclined unqualifiedly to admit the superiority, claimed by the plaintiffs' counsel, of *direct* over *circumstancial* proof. On the contrary, I think the latter species of proof is often the most satisfactory and conclusive. We all know how liable witnesses are to be deceived, and even sometimes to deceive; how liable to be warped by influence or feeling, by prejudice or passion:—and how apt, from the frailty of memory, to mistake, after a lapse of time, opinions for facts, and confound information with recollection. The testimony of circumstances on the contrary is always unsophisticated and unsuborned;—neither fallacious nor equivocal. Circumstances, it is proverbially said, do not lie; and to a train of well connected and well attested circumstances, it is difficult for the mind to withhold its assent, even at the expense of *direct* testimony. These opinions, I conceive, are

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drawn from the principles of evidence, and sanctioned by authority. In a court of justice, certainty of proof is unattainable; in lieu therefore of *certainty*, founded only on the view of the *senses*, we take up with *probability*, founded on *experience*. The testimony of a witness, therefore, is weakened in proportion as the story he tells is contrary to probability;—as the fact, to which he deposes, is found unaccompanied by those *circumstances* necessarily or usually attending it;—and so far is a controverted fact, from being settled by the declaration of a witness, that both the facts and declaration are afterwards compared with the other facts in the cause, and are wholly excluded from belief, if outweighed by superior probability. And we often find in *collateral circumstances* an index that will guide us with more certainty to the discovery of the truth of the case, than *direct* testimony. *Gilbert's l. of ev.* 147, 148. *Swift's Ev.* 151, *n.* 11. *Id.* 149, *n.* 8 & 9. Justice Buller, in his charge to the jury, on the trial of captain Donellan, also says, "a presumption, which necessarily arises from circumstances, is often more convincing and more satistisfactory, than any other kind of evidence"; and of this opinion, seems also, judge Story, in the case of the brig Short staple and cargo. 1 *Gall. Rep.* 103 This reasoning emphatically applies to the testimony of the pre-

sent witness, weakened, as it will be found, by inherent defects, and at war with all the facts in the case.

I shall not detain the court with any remarks, upon the style and structure of this deposition, upon the technical precision of its language, and minute particularity of recollection; it is before them; and as the plaintiffs' demand principally rests upon it, without doubt, it will be scrupulously examined by the court. Without questioning the veracity of the witness, it is easy to conceive, that his account of a short conversation, held more than fifteen months before, might be erroneous; a conversation of so remote a date, and of so short a duration, and which the witness had so little interest to hear, understand, or remember, could hardly fail to be misconceived or misrepresented: of this, I think, we are furnished with strong intrinsic proofs.—The parties, as detailed in this testimony, begin with an inquiry, on the part of Marsh, "whether it were best to insure the brig? Finlay said at first, he did not know, &c." This introduction serves as an aukward precursor of *positive* orders; on the contrary, it pretty strongly marks both Marsh's uncertainty in this respect, as well as his implicit reliance upon the opinion and discretion of Finlay: nor is it at all likely, as his determination to make insurance proceeded only

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from the advice given him by Finlay, that the orders to make insurance, should be given in such *positive* terms as are set forth in the subsequent part of his deposition.

A striking proof, however, of the witness's misapprehension or misrecollection is found in the reason he makes Finlay assign, why the brig should be insured on her voyage back, "because she would then be exposed to the equinoctial gales."—leaving this port on the 23d of February, the brig on her voyage *out* might be exposed to these gales, and therefore it was reason to insure her *outward* voyage; but on her voyage *back*, which probably would not, and actually did not commence, until the latter part of April following, she seemed little exposed to this risk. The vernal equinox takes place the 21st of March; a vessel therefore leaving port, on her return voyage, on the 22d of April (above a month afterwards) seems to have a little fear from the gales of the *vernal*, as from those of the *autumnal* equinox. When an inadequate and assured reason is thus assigned for this opinion of Finlay, we have a right to believe, that the witness is grossly mistaken, and that the opinion, if given, exclusively referred to the voyage out, which might bring the brig within the verge of these equinoctial gales, and never to the voyage *back*, beginning above a month after-

wards. The equinoctial gales, though not confined to the very days, when the sun crosses the line, by no calculation are extended in their range to a month before and after their periods; such a calculation would extend their empire over one third of the year.

But leaving all intrinsic grounds of distrust; let us compare the testimony with the facts in the cause, and examine it according to the rules of probability.

Did or did not these instructions to insure, extend to the voyage *back*, and were or were they not positive? Let us take the case upon either hypothesis, and see which is borne out by the facts in the cause. Hypothetical reason, both in law and science, are considered as yielding satisfactory proof, when none but the given hypothesis explains all the phenomena.

Upon the plaintiffs' hypothesis of *positive* instructions, extending to the voyage *back*, we are beset, at every step, with difficulties beyond solution; neither the conduct of the parties, nor the testimony of the witnesses, are capable of being reconciled or explained.

The defendants, upon the scheme of argument, are made to act gratuitously against both their interest and reputation—are made guilty of a wanton breach of duty—a flagrant violation of instructions and engagements, without any osten-

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sible or assignable motive or excuse:—not from neglect nor forgetfulness, because they applied for insurance upon the brig; nor from a wish to save the advance of the premium, because the sum was too paltry and insignificant, and because on the policy in their hands, they would have, in case of loss, not only a lien for that advance and commission, but also for their general balance of account—thus enlarging both their profits and security:—instructions too, the breach of which exposed them to the penalty of becoming insurers upon this vessel, and in case of loss, responsible for her full value:—yet though thus penal, not committed, (as was invariably the case with similar instructions) to writing, or even entered upon their books;—guilty too of voluntary and gross misrepresentations and falsehoods at the insurance office, *in asking only for the insurance out* and in assuring the secretary, when they declined the terms of insurance, *that their orders to insure the brig were discretionary:*—and all this waste of truth, character and principle, for the poor chance of contingent injury to persons, with whom they never were at variance, and exposing themselves certain litigation, loss and reproach.—Can we believe in such gratuitous folly and wickedness, or subscribe to an hypothesis standing on such grounds? Can this conduct be softened or ex-

plained upon the plaintiffs' suggestion of a want of communication between the two partners upon the subject of those instructions? This suggestion, in itself destitute of probability, is destroyed by the fact, that the instructions to insure were given to Finlay, and the application of insurance made by Flower. The conduct of the defendants therefore remains without excuse or palliation, and a mercantile house, long established in this city of untainted character and credit, upon this hypothesis, is made to risk and lose both, not only without interest or inducement, but under impending penalty and loss.

Neither, upon this hypothesis, can the conduct of the plaintiffs be better understood or explained, but remains equally destitute of probability, and contrary to experience. Not to dwell upon Marsh's positive declaration to the defendants, in presence of Crocker, their book-keeper, *that upon the arrival of the brig at Norfolk, it would depend upon circumstances, whether she returned to New-Orleans, or proceeded elsewhere*, which wholly excludes all idea of insurance upon the *return* voyage. How upon this principle, can we account for the conduct of the plaintiffs when they received at Attacapas, from Mr. Jennings, (her former master) the news of this accident—of a probable loss, involving as is suggested, almost their all. It would seem natural,

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upon the first hearing of such a loss, and in conversation with their former captain, to emphasize the *positive* nature of the orders they had given the defendants, to have the brig insured on her *return* voyage;—to reproach them for their disobedience of orders—even to aggravate their conduct, and threaten them with their responsibility. These feelings and reproaches would have been as excusable as natural. But instead of thus exhaling themselves in reproach, not a syllable even of complaint is breathed. Now according to the admitted testimony of Jennings, "*they regretted the loss of the brig, but did not pretend nor suggest, that they had ever given the defendants, or either of them, any instruction to effect insurance upon her,*" nor impute any blame to them for not effecting it. In a subsequent conversation, also between Marsh and Finlay at New-Orleans, Cooper, the defendants' bookkeeper, who was present, when questioned as to the particulars of this conversation, says, "*he does not recollect hearing any blame thrown out upon the subject, and heard no censure implied by Marsh against Finlay.* Marsh asked Finlay, if the brig was *insured? Finlay answered, no; Marsh then said, it was an unfortunate circumstance, and seemed to regret it.*" In a separate conversation had soon afterwards, between Cooper and Marsh upon the same subject, not an idea

is suggested by Marsh, of any orders given to insure. About the 10th of May, 1817, above two months after the sailing of the brig from New-Orleans, Terrill is in town, and receives from Crocker (the defendants' book-keeper) an account of that date, headed, "*brig Hero and owners for disbursements*," in which no advance of premium nor commission (as would have been the case, if insurance had been effected) stand charged. Terrill receives the account, seems satisfied with it, says not a word of insurance, and makes no comment upon the omission of these charges. The general account, into which is copied verbatim this particular account of the disbursements of the brig, is also suffered to pass without comment or inquiry. About the 10th of July, 1817, another general account bearing that date, into which is also carried the balance of the amount of these disbursements, is handed to Marsh, who settles the account, and receives and gives his receipt for the balance struck.

Was the advance of premium, an item too insignificant to be missed in the account? On the contrary, including commissions, would it not nearly equal the whole account, as it now stands, at $327 29? Two and a half per cent, rate of insurance upon the voyage out and back, upon $5000, value of the brig, would give, without commission, $250. Would not an exclamation

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then naturally and involuntarily burst from the lips of the plaintiffs, upon missing these charges in the account of the brig's disbursements, good God! Is it possible our brig is not insured? And to insist, as it was not then too late, to have it immediately done.—Can this conduct be rationally attributed to any inadvertence or forgetfulness? Can this be seriously pretended, when this vessel, as we are told, included their all—when she was *then* on her *return* voyage, exposed to these famous equinoctial gales;—when but a short time before, according to their witness, they had so particularly discussed the rate of insurance, fixed the amount to be insured, and provided for the advance of premium.

But to finish the review of the plaintiffs' conduct, on the 14th of August, Terrill commits to the defendants, "these faithless agents," fresh business, as well as on the 6th of November following.

During all this period, living in the neighbourhood of each other, and with a full knowledge of all these facts, no hint of blame on the part of the plaintiffs is thrown out, no sign of disapprobation appears: neither in their interviews and intercourse with the defendants, nor in their conversations with others:—with Cooper—with their former captain, Jennings—with their late captain, Fisher:—nor even in their letters to him,

in answer to one from the Havanna, informing them of the situation of the vessel, and requesting their instructions, does it appear that the slightest mention of insurance, or smallest manner of complaint, escapes their lips or pen? Can this conduct, upon the supposition of *positive* orders to insure, and so serious a loss produced by their violation, be considered natural or probable? Is it in human nature? "*Hath not an owner senses, affections, passions?*" Is this the conduct of men, not only greatly suffering, but deeply injured, towards the authors of their losses and injuries, and while smarting under them? Is it not equally destitute of all probability, and contrary to all observation and experience? And yet, this amicable intercourse and friendly deportment continue, for nearly a year—up to about the period of the institution of this suit, when they are suddenly awakened to a full perception of their wrongs and injuries.

Upon this hypothesis, therefore, the conduct of the plaintiffs is as little be solved, as that of the defendants: whereas upon the contrary one, of *discretionary* instructions to effect insurance upon the voyage *out*, the conduct of both parties becomes natural and intelligible, falling in with common experience, and the usual course of human conduct and feelings; and every thing, says Domat, which happens naturally and commonly is taken as true.

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Neither upon this hypothesis, can the testimony of the witness be better conciliated or explained. When there is an apparent inconsistency or contradiction in the testimony of witnesses, it is a general rule, that such construction shall be put upon it, as will make them agree, rather than such as will make them disagree; for the law will presume that every body swears the truth. *Swift's ev.* 145, *Gilb. ev.* 154.

The testimony of the plaintiffs' principal witness in the cause, can in no other way be reconciled to the other testimony in the cause, than by taking the contrary hypothesis, and by supposing that, in a short conversation, occurring long since, and in which he could take no interest, and did not even appear to know one of the parties, he mistook or misrecollected, the value and extent of the plaintiffs' instructions. The single fact indeed, of the supposed risk of the vessel from equinoctial gales on her voyage *back*, which she could *only* be exposed to on her voyage *out*, shews the probability of such mistake or misrecollection—otherwise this testimony stands in the cause, weakened by intrinsic defects, unsuppported by assistant proof, met by counteracting circumstances, and opposed by direct testimony.

This testimony is said, however, to derive support from that of Fisher; but the record, to

which I refer, shews between them rather a contradiction than concurrence. The master does not pretend to know whether these instructions to effect insurance were *verbal* or *written, positive* or *discretionary;* and also expressly declares that *he heard no mention of any insurance upon the voyage back.* His acknowledged uncertainty, in these respects, is further evidenced by his letter to the defendants, from the Havanna; where he says, he does not know whether the vessel were insured or not, but is advised to proceed as if she were not. These declarations militate indeed, with some parts of his principal examinations; but the strongest testimony is surely there produced upon the cross examination, when drawn from a reluctant witness. I take no pleasure in pointing out inaccuracies, or else several might be cited in this testimony. His belief of the vessel's being insured, arose, he says, from his instructions, which he acknowledges however, were never communicated to the defendants, and which when produced, seem to justify no such belief, and which from his letters from the Havanna, he soon ceased to entertain. At the Havanna he also calls himself *consignee* as well as captain, and the balance of the proceeds of sale of the brig, which he swears were left in deposit, for those whom it may concern, was, at his own request, expressed in his own petition to

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the royal Consulado, left in deposit for the owners, and this balance, instead of $270 as stated by him in his testimony, amounted, by the Spanish proceedings, to $358,37 1-2.

Without dwelling on these inaccuracies, enough has been said to shew, that the testimony of Little is not strengthened by that of Fisher; and I shall now shew, that it is directly opposed by that of other witnesses.

It is opposed first, by the declarations of Flower, at the period of his application for insurance upon this vessel:—these declarations, accompanying this application, are considered in law, as making part of the application itself, and as such may be given in testimony. *Swift's ev.* 139, 6 *East.* 188. Longer, secretary of the insurance company, in his deposition says, that Flower (14th of February, 1817) made an application for insurance upon the brig and cargo, from New-Orleans to Norfolk, Petersburg and Richmond; that Flower found 2 and a quarter per cent. the premium demanded, too high—accepted it however for the cargo, because, he said, his orders were *positive*, but rejected it for the brig, as he had a *discretion*. At the period of making this application, Flower was as devoid of interest as the witness, whose testimony he contradicts: his declarations may be considered like the examination of a witness taken at the time, he

was uninterested, but afterwards becoming a plaintiff, in the cause. 1 *P. W.* 288, *Goss* vs. *Tracy*. His instructions must also then have been fresh in the mind, and he could have no interest either to violate or misrepresent them; and yet he declared, they were *discretionary*, and, upon the ground of that discretion, declined accepting the terms of insurance proposed. Was Flower or Little most liable to mistake the *nature* of these instructions? Are his declarations made at the time less worthy of credit, than those of Little, made more than fifteen months afterwards?

It is a fact also not to be omitted, that this application for insurance was made only for the voyage *out*, and that nothing was said in relation to the voyage *back*: an unequivocal proof, that the defendants' instructions, whether positive or discretionary, did not extend to the *return* voyage, in which the vessel was lost.

Is not then the testimony of Little, taking it as unimpaired by any objections brought against it, fairly counterbalanced by that of Flower? And is not the latter, thus introduced, as credible a witness as the former?

But the testimony of Little is equally opposed by that of Marsh; it being the peculiar fate of this witness to be contradicted by both parties. From Marsh, Crocker (defendants' book-keeper) understood, that the agency of defendants, as to

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this vessel, ceased upon her leaving port; and by Marsh he is also informed, that upon her arrival at Norfolk, it would depend upon circumstances, whether she returned to New-Orleans, or proceeded elsewhere. Of this opinion seemed also captain Fisher: when, at the Havanna, he stiled himself the *consignee* of the vessel; and it is a fact, demanding attention, that on a former, and precisely a similar voyage, under the command of captain Jennings (as we find from his admitted testimony) the agency of the defendants, in like manner ceased, and the vessel was put under the sole control of the captain, either to return to New-Orleans, or be freighted for any other port —that she then actually made an intermediate voyage;—that the insurance was then left to the *discretion* of the defendants, and that none was then effected upon her, from New-Orleans. Strongly corrobatory of this is also the letter addressed by the defendants to the plaintiffs, of the fourth of May, 1816, when the brig was bound from New-Orleans to Richmond, and on which they recommend to the plaintiffs "to have her consigned to some house *there*, to *send her back here, to New-York*, or any other place, where a good freight might offer."

Thus is the testimony of this witness found in contradiction with the declarations of both parties to this suit, as well with all the facts in the

cause, and this concurrence against it of direct and circumstancial proof (exclusively of inherent improbability) demonstrates his misapprehension or misrecollection. Admitting however, the affirmative proof (resting principally, if not wholly, upon the testimony of this witness) to be only counterbalanced, and the case rendered doubtful, the plaintiffs must fail, since they are bound to adduce not merely an equality, but preponderance of proof, and it is settled law, that no man can recover on a doubtful demand. *Swift's ev.* 151, *n.* 11, *id.* 149, *n.* 8.

It has been objected, that as we have not called witnesses to impeach the credit of this witness, his deposition must, therefore, be taken as true. It is not, however, the *credit* of the *witness*, that we wish to impeach, but the *credibility* of his *testimony*. It is further objected, that we reach his *credibility* only through his *credit*, On the contrary, we have sought to explain and reconcile its discordance with the other testimony: upon our hypothesis alone can this be done.

Under this head, and in this connection may be noticed some miscellaneous objections, omitted in the general view taken of the testimony; though perhaps, almost too minute and immaterial, either for notice or reply.

As a proof of the defendants' *general* neglect as agents, (though surely not issuable in this cause)

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is cited the acknowledged correspondence of the captain from the Havanna; but from the testimony of the defendants' book-keeper, it appears but one of these *numerous* letters was received: (*Letter B. 15th of May*, 1817.) This same letter is next used for the purpose of shewing their *continuance* as agents, in relation to this vessel, and fixing upon them greater responsibility, as being the only persons, to whom the captain looked for advice and relief;—but its perusal at once shews, that the defendants were merely employed as a medium of communication with the plaintiffs; and that the request, contained in it, of communicating to them its contents, was immediately complied with by the defendants, as appears from a copy of their letter of the 11th of June. With the same view, a letter from the plaintiffs to Luke and Lezir of Richmond is produced, which, upon examination, turns out a mere letter of recommendation. To this end the circumstance of the payment of a small balance of freight by Reeves is also laid hold of; which payment, as appears from the testimony was directed to be made by the captain, and received by the defendants, as the plaintiffs' *general* agents, and duly credited in their *general* account, but, independently of direct testimony on this point, let me ask, who did the business of the brig at Norfolk? Who procured the freight, but the captain, acting under the instructions of Marsh?

The want of *written* instructions to effect insurance, particularly when those instructions are said to be *positive*, I have already noticed, as at least contrary to usage and in this case rendered more remarkable, as such instructions *in writing* were always required by the defendants. To this it is answered, that no such were required in making insurance upon the cargo. But it will be recollected, that this insurance was made under the eye of the owner of the cargo, who was himself upon the spot, and sailed in the vessel. However it may be the bounden duty of a ship's husband, if so instructed by his principal, to obtain policies of insurance, it is distinctly laid down that for this he must have express authority. 5 *Burrows*, 2727. Express authority supposes an authority in writing; and this would certainly be less dispensed with upon the present occasion as coming from a mercantile house, the business of which, as appears from the admitted testimony of Jennings, was loosely conducted, and a want of harmony prevailing between the partners. This, however, was not done; nor even an entry made in the book, kept by the defendants for such purposes;—nor even the existence of such orders suspected by the defendants' book-keepers whose duties as such confined them to the compting-house, and necessarily made them witnesses to every conversation held there; and

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Crocker says, if such instructions were given, he should probably have had a knowledge of them. In commenting upon the conduct of the plaintiffs, I mentioned, that no sign of disapprobation or complaint was shewed by them either in their correspondence or or conversation with the defendants or with others; neither in those with Crocker, or Jennings, or Fisher; and alluded to their letter of the 29th July, addressed to the captain at Havanna; and was here interrupted by the counsel, and told that as the captain could not (however closely questioned) recollect any one particular of that letter, but its date, which by the way, *a few minutes afterwards he tries to forget*, I could draw no conclusions from it. But as this letter was received in answer to that of the captain's *requesting instructions how to proceed in relation to the brig*, if any mention had been made of insurance, or any blame imputed to the defendants, for not effecting it, would not have been recollected? And, is it not also a little singular, that a letter, containing his *instructions* upon this head, should so completely have vanished from a memory, sufficiently tenacious of every other circumstance in relation to this vessel? And have we not also further right to complain, inasmuch as every scrip of ours has been so carefully preserved and produced, that he should omit to preserve or

produce this letter of the plaintiffs, necessarily having such a bearing in the cause?

In this discussion, I have shewn that by the affirmative of this proposition, not only is the testimony of the witnesses wholly discordant, but the conduct of the parties plaintiff and defendant utterly irreconcileable to human experience and common life—that the testimony of their principal witness is weakened by inherent defects, unaided by adopting the negative of the proposition.

III. Even were these instructions positive, the plaintiffs have failed in taking the legal steps necessary to make the defendants liable either for a total or partial loss; in the former case, by neglecting to abandon; and in the latter, by being guilty of neglect, as well as deficient in proof.

In this suit we are put precisely upon the footing of *insurers*, and the plaintiffs can recover against us, only in point of law which they could have recovered, in case of loss, in an action against the underwriters, had the insurance been effected. *Condy's Marsh.* 301, *note* 92. *Liv: Agen.* 326, 327. And in this action we can avail ourselves of every defence, such as fraud, deviation, neglect even which the underwriters might have set up in action on the policy. *Id.*

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In the case of *De Tassot & Co.* vs. *Crousillet*, in the circuit court of Pennsylvania, it was decided that a claim against an agent, who had neglected to insure, was founded on a breach of contract: that he made himself the insurer; was liable as such, and entitled to the same defence. (*Id.*) And before the same court in the case of *Morris* vs. *Livermore*, the judgment in which was afterwards affirmed in the supreme court, he was declared answerable for the loss as insurer, and entitled to the premium as such. (*Id.*)

If the present suit is brought as for a *total* loss, which the prayer of the petition, claiming $5000, full value of the vessel, shews it to be, the plaintiffs must necessarily fail: inasmuch as they neglected to abandon their interest in the vessel to the defendants: upon receiving news of this accident, it was the duty of the plaintiffs, within a reasonable time to elect, to abandon or not: and if to abandon, to give seasonable notice of such abandonment. And though no particular form of abandonment is prescribed, yet in whatever form declared, it ought to be explicit; and; if unseasonably delayed, is considered as waved. *Cond. Marsh.* 589, 590—600, 609.

The propriety of this principle is too obvious to need illustration; had such abandonment been seasonably made and signified, we should have

been afforded an opportunity of exercising our own discretion—of using our own credit and funds, and of selecting our own means and agents: but, by neglecting so do to, the plaintiffs have taken every thing upon themselves, and wholly deprived us of those advantages.—Neglecting therefore to abandon, it will hardly be pretended that they are entitled to recover as for a *total* loss. Is not their neglect, as well as deficiency of proof, equally fatal to their pretensions to recover as for a *partial* loss?

It will be distinctly kept in view, that though by abandoning, the captain, (until superceded) might be considered as *our* agent, yet neglecting so to do, he still remained the agent of the plaintiffs; who, by continuing him as such have adopted all his acts. *Cond. Marsh.* 592. For his acts therefore, *they*, and not *we*, are responsible; and *his* neglect is *their* neglect. Let us see in what this neglect, as well as deficiency of proof, consists, and the legal consequences which result.

As a flagrant proof of continued and general neglect, on the part of the captain, we need but cite his state of perfect inaction, from the 13th of May, the day of his arrival at the Havanna, until the 25th of June following; when for the first time, he applied to the royal Consulado. This was the period, which ought to have excit-

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ed his greatest diligence and activity; but during this time of nearly six weeks, while the brig was lying exposed to heavy expense, and subject to daily deterioration, about what, was this diligent captain employed? He became epistolary, say the gentlemen, and wrote five or six unacknowledged letters to the defendants (but *one* of which, by the way, ever came to hand). He also, it is said, unsuccessfully addressed several merchants at the Havanna. But did these important acts require a period of a month and a half for their performance?—True, on the 10th of June, nearly a month after his arrival, he had something which he terms a survey called upon the brig; but which, I shall presently shew, is wholly irregular and inadmissible. At last, however, having contracted debts, and his money falling short and his crew impatient, he addresses the Consulado, by which tribunal the brig is appraised at $4030, and afterwards, at the prayer of the captain, in order to pay the wages, provision, &c. boarding of himself and crew, and the debts incurred upon this account, she is ordered to be sold, and about the beginning of August is actually sold for $1350; making a difference between the appraisement and sale, of $2680. Of the neat proceeds of sale, amounting to 1233, the sum of $492 is applied to pay the wages, provision and boarding of the captain and crew: and

of this $492, that of $192, exclusively to the captain; who, in addition to his wages and share of provisions, is paid for *six weeks boarding, at the rate of* $12 *per week*. The balance after paying port duties, costs and charges, stands at $357,37 1-2, instead of $270, as stated by the captain; and is *not* deposited, as stated by him with the Consulado, for those *whom it might concern*; but, at his request, *for the owners*.

What, under these circumstances, was the duty of the plaintiffs or of their agent, the captain? Not electing to abandon, and treating this loss at first as a *partial* one, and now seeking to recover against us as for a *total* one, they ought to be made responsible for the slightest neglect, and held to the strictest proof. It was the first duty of the captain, within twenty four hours of his arrival at the Havanna, to have *noted*, and within a reasonable time afterwards, to have extended his *protest*. It ought to have contained a circumstancial account of the accidents, extracted from the log-book, duly attested before the notary, and sworn to by himself, his officers and crew. It is always considered as a most important document, and indispensably necessary by all laws. *Jac. Sea Laws*, 373—*Ordin. de Bilb.* 242, *c.* 24, *no.* 62. It is necessary to fix facts when they are fresh, and to protect parties from the fraud, misrepresentation and imposition of

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the captain, insurers as well as owners. In the case of the brig Struggle, judge Livingston observes, that "perhaps a case never occurs that a vessel is forced to abandon a voyage, without stating the reasons of such deviation in the form of a protest, at the first port where she arrives. Although of itself it would be no evidence, the master might have stated in his testimony, that he had made one at Martinico. His not having done so, subjects him to the just presumption of his having neglected it altogether, and that his going thither was brought about by a necessity of his own contrivance, and not by the act of God, or adverse winds." 9 *Cranch* 75. How came this important and necessary duty to be neglected, of which no master that ever commanded a vessel, is ignorant? By the plaintiffs' counsel, it is *inferred* to be done, from an expression occurring in one of the captain's petitions to the Consulado, where he says he went, within 24 hours, *à formar su protesto, to* make his protest. But was it actually done? If done, would it not make part of the Spanish proceedings? Would it not have been produced on the trial of this cause? Would not the captain so have stated it in his testimony? By the latter omission alone "he is subjected," to use the words of judge Livingston, "to the just presumption of having neglected it altogether." But if

actually done, why let me again ask, on the trial, was it not produced? As insurers in this action were we not entitled to its production? As such, ought it not indeed, to have been exhibited to us even prior to the legal demand of a loss? In this connection, I might also ask, why was the log-book, clearance, &c. or other ship's papers withheld? These, as well as the protest (if ever made) we peculiarly important in this case. From a part of the Spanish proceedings, one might be led to suspect, that the brig, in fact, did not come immediately from Norfolk, but Perth Amboy; which, if true, would as a *deviation*, discharge us from the present claim. I refer to these proceedings. *Nota que produxó el capitan Americano, de los individuos que componen el equipage del buque de su mando, ſha ut supra, copia del Roll del brig Americano Hero, su capitan John Fisher, procedente de port (Perth) Amboy, que entrò en este puerto de arribada.* Then follows the names of the six sailors: the *very same*, whom, on the following page, we find actually composing his crew. Will it be said this "*note*" is taken from the register of the vessel, and has no relation to this voyage? But this cannot be the case, as the register, which is transcribed entire, is not introduced until *three* pages afterwards. How is this to be got over? There is nothing to contradict it in the

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shortness of the period which elapsed after the brig left this port; she sailed on the 23d of February, which gave her full time to discharge her cargo at Norfolk, and afterwards touch at Perth Amboy. The fact, that the captain, not only in his first application to the Consulado, when he recounts his misfortune, but in all his subsequent ones abstains from naming the port of departure, strengthens this suspicion; and it is also not a little increased by the absence of the protest, and all the ship's papers.

It was the captain's next duty to have called a *survey* upon the brig, in order authentically to ascertain the amount of damage, and the expense of repairs. This step is as important as that of making the protest; and equally required both by law and usage. Instead, however, of a regular survey, we are presented with a paper, purporting to be signed by the master of one vessel, by some person (whether officer, passenger, or sailor not expressed) of another, and by a ship carpenter; in which these personages give it as their opinion, that it would cost more to repair the brig than she was worth; but made certain by no calculation of loss, nor expense of repairs. Stamped also with every species of irregularity; neither called by *authority*, nor sanctioned by *oath*, nor attested by any *officer*; and bearing date, the 10th of June, nearly one month after her arrival.

The *reasons* also assigned for selling the brig have nothing in common with the defendants, considered in the light of insurers. She is not sold, because in an irreparable or perishable condition. but principally in order to satisfy the wages and boarding of the captain and crew; a proper reason undoubtedly for selling the brig, but rather a slender ground to make underwriters responsible for a loss. Even the application of the captain to the Consulado is in the nature of a libel for wages.

No *necessity* for the sale, arising from the damage the brig actually received, has been distinctly shewn. On the contrary, though she suffered some damage in her hull, the damage was principally confined to her spars and rigging. On the 12th of May, she is struck with lightning, yet it appears she was not so much injured, as to prevent her arriving the next day, at the Havanna, *fifty-five miles distant*. And so late as the 4th of July following, she is appraised by the Consulado at $4030, only $970 short of her full value, previously to the accident; when, as the captain informs us, she was as good a vessel as he ever sailed in, new, sound, staunch and well formed. On her arrival then at the Havanna, her frame generally sound, and having received only a local injury, was she not worthy of being repaired? But deserted afterwards by her crew,

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abandoned also by her captain, who had put himself into snug quarters ashore—in a state both of deterioration and dereliction, her fate was easily to be foreseen. The *necessity* therefore of selling her was one of the captain's own creation, and produced entirely by his neglect and mismanagement. She was in effect rather *sacrificed* than *sold;* and this too by the mere authority of the captain, without any pretence of instructions to this effect from the owners.

Upon no legal or equitable ground, can we be made responsible for the acts of the captain; they must be all referred to the owners by whom he was appointed, and of whom he continued the agent. If insurers, we did not insure against his neglect or mismanagement. The owners therefore, are responsible for all losses arising from these causes. 13 *John.* 458, *Grim* vs. *Phœn. Ins.* 8 *Mass. Rep.* 308, *Cleveland* vs *Un. Ins. co.*

But the plaintiffs have not only been *guilty of neglect*, but are also *deficient in proof;* and this *deficiency* principally arises from this *neglect.* In a case, however, always considered as a *hard* one, in which we are not voluntary insurers, but made so by the operation of law, it behooved them, claiming for a partial loss, to adduce satisfactory proof of its amount. As a substitute for regular accounts, and those proofs, usually required in cases of insurances, to ascertain a loss

they have relied upon the proceedings before the *Consulado*, sought to be helped out by the testimony of the captain, so strongly interested in this case, to purge himself from neglect and responsibility towards his owners, and of course given under the strongest bias. But, ought these Spanish proceedings, to which we were neither parties nor privies, to be admitted as proof against us. Were they the proceedings of a court, and even ripened into a judgment, they could only be evidence against a *party to the action*, or one claiming under him. *Peake* 38, *Swift* 15. Instead of this irregular and inadmissible testimony—these *ex parte* proceedings, why did not the plaintiffs pursue the commission *they took out* for the Havanna, in which we should have had an opportunity of cross-examining the witnesses? It would be monstrous to believe, that we can be concluded by the declarations and acts of the different persons, embodied in these motley proceedings, while we were not heard nor represented.

From the want then of regular account and customary proofs, and the absence of the protest and ship's papers, though the plaintiffs may have proved a *loss*, they have failed to actertain its *amount*; without which they can recover but nominal damages. 1 *Mass. Rep.* 236, *Urquhart* vs. *Robinson*. Had they been guilty of no ne-

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glect, and had there existed an absolute necessity for the sale of the brig, and had we been shewn responsible for the loss, the rule to ascertain its amount, would probably be found in the difference between the neat proceeds of the sale of the brig $ 233, and her prior value $5000, giving $3767, which less $250, amount of premium, would leave the balance at $3,517.

But the items which stand against us (not indeed, in the plaintiffs' account, for they exhibit none, but claim, as for a total loss, the unbroken sum of $5000, value of the brig) in the Spanish proceedings, even upon the admission of full proof, are wholly inadmissible. As one item we find charged the expenses of the brig, while at the Havanna, from the 13th of May, date of her arrival, up to the beginning of August, period of her sale: even the sum received by the captain for the wages and boarding of himself and crew, figures in the demand:—making us, in this manner, insurers upon the *voyage and wages*, as well as upon the *body of the vessel*. 1 *T. R.* 127:

Even the balance of $357, 377 1 2 left in deposit in the Consulado for the benefit of the owners is not excepted in their claim.

But it is unnecessary to dwell upon particulars, I assert, that the plaintiffs have exclusively claimed as for a *total loss*: they alledge in their petition, the brig to be worth $5000, and pray

that the defendants be decreed to pay $5000, value of the said brig; and they come wholly unprovided with any proof to recover as for a *partial* one; they produce no statement;—they exhibit no account;—they are supported by no vouchers or documents;—they neglect to pursue the commission which they had taken out, by which such loss might have been verified and ascertained;—they therefore, must fail in their demand, as for a *partial loss*. Neither does this speculation, upon the two species of loss, at all contribute to recommend their demand. By first treating this loss as a *partial* one, we are precluded from making any effort to remedy or diminish it; obtaining this advantage, they then boldly demand as for a *total loss;* and on the trial, convicted of neglect and failing in proof, they come back to a *partial* one. And never, in a case of insurance, was it before known, that all what is termed the documentary proofs, was withheld from the insurers—that not a single ship's papers was produced, and not even the protest, if made, suffered to appear.

Aware that the whole case is now before the court, as well the facts as the law, we forbear to notice, the different bills of exception, which we took in the court below. As the plaintiffs' counsel, however, in default of other proof and argument, wished to derive some advantage from the

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verdict of the jury, I refer to these bills of exception, to shew, that the jury not only were permitted to receive improper testimony, but were misdirected in points of law. It being a *special* jury, does not turn their finding into a *special* one, and after all the ingenuity displayed, I cannot help thinking, that there is some difference between the *special* verdict of a jury, and the verdict of a *special* jury. Had the plaintiffs wished to have benefited by the verdict of the jury, they might easily have drawn up facts to be submitted to them, and thus procured a special finding. 1805, 26 § 6. But neglecting to do this, it is too late to avail themselves of their verdict; the cause now rests exclusively upon the law and the testimony. 4 *Martin*, 320, *Abat* vs. *Doliole*.

DERBIGNY, J. delivered the opinion of the court. Abel Terril and John T. Marsh, formerly trading under the firm of Terril & Marsh, owned a brig named the Hero, which while here was consigned to the house of Flower and Finlay, the defendants, in February 1817. Sometime before the departure of the brig from this port, John T. Marsh one of the plaintiffs applied to them to cause the vessel to be insured. It is alledged that he gave positive orders for that purpose, requesting the insurance to be made both for the outward and the return voyage. The in-

surance, however was not effected; and the brig having been struck by lightning and considerably shattered on her return here, the plaintiffs pray that their agents may be decreed to pay them damages to the amount of their loss.—From the verdict and judgment which the plaintiffs obtained in the court of the first district, the defendants have appealed.

The defence, which they set up, is

1. That Abel Terrill and John T. Marsh, being no longer in partnership at the time this suit was instituted, could not sue in the name of the firm.

2. That the instructions, given by the appellees to effect insurance, were not positive but discretionary, and they did not extend to the return voyage.

3. That supposing the instructions to have been positive, the appellees have failed in taking the legal steps necessary to make the appellants liable.

I. The first ground we consider as untenable in a case where all the parties interested in the late firm have united as plaintiffs in the suit. It would at best make it questionable whether they can recover jointly or must have judgment each for his share; but it cannot defeat their rights to join in the same suit for claiming property which is so common between them.

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II. The next plea of the appellants rests principally on matter of fact. And here, although it it is evident that the jury cannot have found for the plaintiffs, without being satisfied that the instructions for insuring were positive, and that they did extend to the return voyage, yet as the verdict is a general one, and the whole of the evidence is spread before us, such as it was produced below, the law makes it our duty to enquire into that evidence, and to decide whether it supports the finding of the jury.

That instructions, were given by one of the plaintiffs, to the appellants to effect insurance on the brig Hero, when she was about to sail from this port in February, 1817, is a fact satisfactorily established. Whether these instructions extended to the return voyage of the brig is the question which requires investigation.—To this point one single witness has deposed. This deposition, if rational in itself and not inconsistent with the circumstances of the case, must prevail. Let us examine it attentively. An evening in February, 1817, the witness went into the store of the defendants with John T. Marsh, one of the plaintiffs, and *then and there* heard a conversation which took place between Marsh and the late Michael Finlay, one of the partners of the house, relative to the insurance of the brig Hero, *on a voyage then in contemplation to be*

performed.—Here is from the beginning a great want of certainty, as to the voyage for which this is insurance is to be made. This only witness, on whose only deposition the defendants are to be charged, does not know what was the voyage, about which this conversation took place. The brig was dispatched sometime after to Norfolk or Richmond: but surely we are not to conclude from thence that the voyage, in contemplation at the time of the conversation alluded to, was indubitably the voyage which was afterwards performed. Yet unless the identity of the voyage be proved beyond a doubt, the plaintiffs' case has no basis to rest upon. But to proceed: Marsh, who had not made up his mind about insuring the brig, asked Finlay, "whether it would be best to insure her;" Finlay after some hesitation, said: "yes; the brig should be insured, *as she will be on her return voyage about the equinoctial gales.*" Here the witness gives the reason for which the brig was to be insured; that reason must be consistent; for if the motive, said to have been assigned for an action, is incompatible with it, the person who relates what he has heard, will be supposed to have misunderstood the conversation. If a witness would say that a vessel was ordered to be dispatched in December to Greenland, to avail herself of the long days and mild season, there would be no

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doubt of such witness having mistaken one country for another, and no hesitation in believing that the vessel was sent to the south, contrary to the positive declaration of the witness. The mistake here is not quite so striking, but the act and the reason assigned for it are equally incompatible.—The owner of the vessel, hesitating whether he will or not have her insured, is advised to have an insurance effected, *because of the danger of the equinoctial gales.* The vessel is likely to sail, and did astually sail, at the latter end of February; immediate danger awaits her the moment she leaves this port. Yet, what is the reason assigned for the insurance? That she will be exposed to the equinoctial gales *on her return.* What! And not on the outward voyage? If she was to be insured on account of the equinoctial gales, was not the outward infinitely more dangerous than the return voyage? During the first, she was *certainly* to be exposed: during the second, it was *doubtful.* If she was detained until the middle of April (and the evidence is that she did not sail before the 22d. though she met with no delay) the dangerous season was over. Yet not a word is said of the insurance on the voyage *out,* and without any recommendation to that effect, Finlay takes a memorandum in writing of the insurance to be made *on both.* Is this credible? And must we

not conclude, on the contrary, that the reason assigned for insuring this vessel applied to the immediate voyage, not to the other, and that the witness misunderstood the remark made by Finlay.—An additional reason to be convinced, that such was the understanding of the parties, is that the per centage spoken of is applicable only to one voyage. For if the insurance was to be effected on both, five per cent, not two and a half, would have been mentioned as the probable amount of premium. The conduct of the appellants too, after they had given this advice, agrees perfectly with the motive which they had assigned. They go to the insurance office, and propose to have the brig insured for the immediate voyage, that during which the vessel was likely to encounter the equinoctial gales: no mention is made of the other. And here, let us understand the nature of the instructions given by Marsh to Finlay, the better to test the extent of responsibility to which the appellants may be subject. Marsh did not come to Finlay with a determined intention to have his brig insured at all events: he did not order him at once to cause the insurance to be made. He consulted him upon the subject; and had Finlay told him, that the insurance was unnecessary, it is more than probable that he would have thought no more of it. Finlay, however, considering that the vessel was

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about to be exposed to the equinoctial gales, recommended him to have her insured *on that account*. It is very clear, that in giving that advice, he must have had in view the outward voyage; and, that he so understood it is evident from the application at the insurance office. Now, although error will not discharge an agent, to whom positive orders are given, in terms that cannot be mistaken, because there the mistake must be owing to carelessness or neglect, the case is certainly different, when it is the principal, who has misunderstood the advice given him by his agent. If the agent evidently meant one voyage, and the principal understood another, no contract of mandate, can be said to have taken place between them; for in that, as in all other covenants, consent is the principal ingredient, *obligatio mandati consensu contrahentium consistit*; (*ff. mand.*) and there can be no consent where the object of the contract is mistaken: *si de alia re stipulator, de alia promissor senserit, nulla contrahitur obligatio.*

But, supposing that Marsh had given to Finlay clear and explicit orders to insure the vessel, both for the outward and return voyage, yet, from a view of the other facts in the case, we do not deem this sufficient to entitle the plaintiffs to recover.

What an agent fails to do according to his in-

structions, or what he undertakes to do beyond those instructions, will not always make him answerable for the consequences. If the constituent chooses to ratify what he has done, or to assent to what he has omitted to do, he is, of course, discharged from any responsibility. We find in this case, that before the return of the brig to this port, a particular account of the expenses of the vessel, together with a general account current between the parties, is handed to one of the plaintiffs. The account consists of a few items, and amounts only to the sum of $327. The article of the premium of insurance would have nearly doubled it. The account, however, is received, and not one word is said about the omission of the premium; and that, while it was yet time to insure, while the plaintiffs, if they really had ordered the insurance to be made on the return voyage, could yet have the omission supplied, or supply it themselves. Was not that silence an acquiescence in the omission? Most undoubtedly, and why that acquiescence? For this very simple reason: the time of the equinoctial gales was over, and the object of the insurance no longer existed. It is objected that Terril, who received the account, had probably no knowledge of the orders given by Marsh. We must suppose the reverse, and believe that two partners, who reside in the same parish, perhaps in

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the same house, did not fail to communicate to each other any thing material to their common interest; and that during nearly three months, which elapsed between the order for insuring and the rendering of the account to Terril, Marsh did not leave his partner uninformed of what he had done with respect to the vessel, which constituted, it appears, no inconsiderable portion of their partnership stock, and in relation to which, it is admitted, "he was always unwilling to give any instructions without the concurrence of Terril."—It may be further observed, that Marsh himself settled an account with the defendants in July following, and gave them a receipt "for balance as for statement rendered," that in August of the same year, Terril sent them some money to be credited on his account, and that as late as November, he requested them to forward him some articles, for which he says "he shall not be in funds to pay before March." If the whole of this conduct, and particularly the receipt of the account in May, be not an acquiescence in the omission of the insurance, nothing short of an express declaration to that effect could be deemed sufficient. Yet, it is a principle generally acknowledged that the acts of the constituent, from which an adoption of those of his agent may be implied, ought to be construed liberally. In case of an act done beyond or without the au-

thorisation of the principal, there is no doubt that his knowing and seeing it, and remaining silent amounts to an approbation. *Pothier, contract de mandat, no,* 99. Why his silence at the omission of an act by him ordered to be done, should not also amount to an acquiescence, principally while it is yet time to supply the omission, we should be at a loss to conceive.

We are, upon the whole, satisfied that the verdict and judgment from which this appeal is claimed, are predicated upon mistaken evidence, and contrary to the rules of law, which govern the contract of mandate.

It is, therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that judgment be entered for the appellants with costs.

QUERRY'S EX'R vs. *FAUSSIER'S EX'RS.*

Appeal from the court of the first district.

If there be judgment against an executor, for the debt of his testator, and no property of the estate being found, an execution issues against the property of the executor, he can-

Derbigny, J. delivered the opinion of the court. In this case, judgment was rendered in this court against the present applicants, as executors testamentary of the late Jean Louis Faussier. 4 *Martin,* 609. And execution having issued against them in their capacity, the writ

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was returned with the endorsement: "no property found". This being considered, as a refusal on the part of these applicants, to exhibit the goods of the estate which they administer, the plaintiff prayed that the execution might be levied on their own property, and the writ having issued accordingly, application is made to this court for relief against that proceeding.

not be relieved, without shewing that all the property of the estate, which came into his hands has been legally administered.

The question to be decided here, is whether an executor, who does not exhibit any goods of the estate of his testator, makes himself liable at once to have the execution levied upon his own.

The common law rule, according to which an executor, who does not plead the want of assets, makes himself liable to pay out of his own property, is not known in our practice. With us, an executor, when sued for a debt of the estate, is not bound to make any other defence than that which the testator himself might have made. If judgment goes against the estate, execution is, of course, levied upon its goods. But what if the executor exhibits none? Is the plaintiff then driven to the necessity of bringing another action against the executor himself, and of proving either, that he has goods of the estate which he conceals, or that he had such goods, and wasted them? The practice does not seem to be settled positively: at least we have not found in the Spanish practical books within our reach, any

express rule of proceeding upon the subject. In the *Curia Philipica*, *part* 2, § 10, *no.* 12, we see that, "against the tutor or curator, no execution ought to issue for the debt of the minor, unless he does not exhibit the property of his pupil, &c." Febrero, upon the same subject expresses himself as follows: "although the tutor should have bound himself as such for the debts of his minor, no execution ought to issue against him, nor against his property, unless he should fail to exhibit the goods of his pupil, for upon his offering to render his account for the purpose of paying, (as it is customary to stipulate it in such contracts) he must be sued in the ordinary way, because by his offer, he arrests the executive proceedings, until the balance of his account be ascertained, &c." *Febrero*, *Cinco Juicios*, 3, 2, § 2, *no.* 82.—Making every allowance for the difference now existing, between the Spanish practice and ours, the amount of this doctrine is, that unless a tutor (and the same principles certainly apply to an executor) exhibits the property which he administers, he is at once liable to execution against his own; but, that he may obtain immediate relief by offering to render his account. This mode of proceeding is attended with no hardship: the executor holds his own fate in his hands: if he is a faithful administrator, he can exonerate himself by shewing the situa-

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tion of the estate; if not, it is as well that he should be made at once answerable, as that the creditor should be obliged to resort to another action. It is not for this court to say, how he is to proceed in the first case: we cannot make rules of practice for the other courts; but when no precise mode of proceeding is established, any step, which may lead to the end pointed out by law, must be deemed regular.

The rule obtained in this case must be discharged, and the applicants left to seek relief according to the principles above recognized.

It is accordingly ordered, adjudged and decreed, that the rule calling upon the judge of the first district, to shew cause, why the *fieri facias* issued in this case, against the property of the applicants should not be set aside, be discharged.

Seghers for the plaintiff, *Livingston* for the defendants.